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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AS *AMICUS CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

Filed by Consent of the Parties

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a nonprofit corporation with 121 corporate members from a broad cross-section of American industry. Its corporate members include manufacturers and sellers in industries ranging from electronics to automobiles to pharmaceutical products. PLAC's purpose is to file *amicus* briefs on behalf of its members regarding issues that affect the law of product liability. PLAC has submitted many *amicus* briefs in state and federal courts, including this Court, and filed a brief in *Consolidated Rail Corp. v. Gottshall*, 114 S. Ct. 2396 (1994).[1]

In *Gottshall*, this Court reiterated that "FELA jurisprudence gleans guidance from common-law developments," 114 S. Ct. at 2403 (quoting *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 568 (1987)). As an organization focused on tort law, PLAC offers unique expertise on those common law developments with respect to emotional distress claims. Moreover, corporate members of PLAC have been party to numerous civil cases involving claims of emotional distress. Because common law courts may glean guidance from the pronouncements of this Court on the standards for emotional distress claims under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* (1994) -- indeed, as *Gottshall* already has influenced

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[1] The parties' written consents to the submission of this brief have been filed with the Court.

common law standards[2] -- PLAC has a significant interest in this case.

SUMMARY OF ARGUMENT

The court of appeals did not draw lessons from the common law. Indeed, it cited not one common law case applying the zone of danger test, designated in *Gottshall* as the appropriate common law standard for emotional distress claims under FELA. At common law, the zone of danger test focuses on actual or imminent physical harm causing fear. While purportedly invoking that test here, the court of appeals instead scrambled it with the largely repudiated physical impact test in its most diluted form. The resulting new hybrid standard abandoned the focus on actual or imminent physical harm. Based on this novel standard, the court held that exposure to asbestos causing no detectable physical injury placed the plaintiffs in the zone of danger.

With only the most glancing reference to one of the three central policies underlying the common law standards, the court of appeals thereby severed the zone of danger test from its logical moorings and its common law functions. Not only did the court disable the test as a filter for frivolous, fraudulent, and trivial claims, it essentially made its new standard the beginning, middle, and end of the inquiry regarding liability. No longer must a FELA plaintiff in the Second Circuit prove that his or her alleged emotional

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[2] *See, e.g., Carlson v. Illinois Farmers Ins. Co.*, 520 N.W.2d 534, 536 (Minn. 1994) (citing *Gottshall* for zone of danger test where plaintiff witnessed best friend's death in accident); *Dickerson v. International United Auto Workers Union*, 648 N.E.2d 40, 50 (Ohio 1994) (discussing policy concerns identified in *Gottshall*); *Kraszewski v. Baptist Med. Ctr.*, 916 P.2d 241, 246 (Okla. 1996).

distress is severe. No longer need the plaintiff show that the distress has physical manifestations. No longer need the plaintiff even provide meaningful objective corroboration of the alleged emotional harm he or she suffered.

The court of appeals' ruling is extreme, and it is perilous. It has flung wide the courthouse doors to all manner of trifling, false, and imaginary claims -- precisely the result that this Court tried to prevent in *Gottshall* and that common law courts have fought for over 100 years.

ARGUMENT

I. THIS COURT AND COMMON LAW COURTS HAVE RECOGNIZED THE NEED TO LIMIT LIABILITY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

One fundamental precept emerges from the common law of negligent infliction of emotional distress -- that emotional distress claims are different from other tort causes of action. They are, unlike most claims of physical injury, ethereal, manipulable, and inextricably intertwined with the normal emotional incidents of everyday life. As this Court recognized in *Gottshall*, those differences have affected the standards of liability at common law, and under FELA. 114 S. Ct. at 2405.

In particular, this Court noted in *Gottshall* the concern of common law courts "that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly

remote consequences of a negligent act." *Id.* (quoting *Maloney v. Conroy*, 545 A.2d 1059, 1061 (Conn. 1988)). These three policy concerns -- a deluge of minor claims, limitless liability, and fraudulent or exaggerated injuries -- have led courts, including this one, to impose a minimum threshold for compensable emotional injuries and to mark outer boundaries delineating who is entitled to recover.

The court of appeals' departure here from the generally accepted application of the zone of danger test does violence to the common law policies embraced in *Gottshall*. It is, therefore, worthwhile to examine those policies in detail, and to assess how courts have historically sought to accommodate them.

A. Courts Have Fashioned Minimum Thresholds to Exclude Minor Claims of Emotional Distress.

Judicial apprehensiveness regarding "a flood of relatively trivial claims," *Gottshall*, 114 S. Ct. at 2405, rests on the fundamental premise at common law that tort law, unlike a railroad, is not a common carrier. Not every injury gets a ride. The law does not, and cannot, afford a remedy for every passing upset, fright, or instance of hurt feelings. In daily affairs, feelings are assaulted constantly by the careless or callous remark, the undeserved reprimand, the social slight. Most of the resulting emotional disturbances, even if caused by the negligence of another, are "so temporary, so evanescent, and so relatively harmless and unimportant, that the task of compensating for [them] would unduly burden the courts and the defendants." *Restatement*

(Second) of Torts § 436A cmt. b (1965).[3] Emotional distress, unlike physical injury, is simply part of daily life. Adopting a test, as the court of appeals did here, that does not screen out the teeming multitude of trifling causes of distress would flout this critical lesson of the common law.

B. Courts Have Set Outer Boundaries to Prevent Unlimited Liability for Emotional Distress.

The second judicial concern, limiting who may recover for emotional distress, has also shaped the law in this area. Because every individual is bound to many others in familial, social, and occupational relationships, the emotional consequences of any act of negligence extend much farther than the physical consequences. Describing this concern as "particularly significant," this Court noted in *Gottshall* that, "Emotional injuries may occur far removed in time and space from the negligent conduct that triggers them. Moreover, in contrast to the situation with physical injury, there are no necessary finite limits on the number of persons who might suffer emotional injury as a result of a given negligent act." 114 S. Ct. at 2405.

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[3] *Accord Champion v. Gray*, 478 So. 2d 17, 18 (Fla. 1985) ("[t]here must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society") (quotations omitted); *Bass v. Nooney Co.*, 646 S.W.2d 765, 773 (Mo. 1983) (en banc) ("it is unreasonable to require that people act so carefully as to avoid occasionally angering or upsetting others, just as it is unreasonable to demand that one never accidentally jostle another in a crowd") (quotations omitted); *see also* W. Page Keeton, *et al.*, *Prosser & Keeton on the Law of Torts* § 54, at 360-61 (5th ed. 1984) (hereinafter "*Prosser*").

The modern development of "toxic tort" and fear of disease cases engenders a related concern about unlimited and unforeseeable liability. If 1,000 people are exposed to a chemical posing a one-percent risk of cancer, then 10 people may have a cause of action if they become ill. With fear of disease claims, if the threshold for recovery were merely exposure, all 1,000 potentially could sue. A mass tort would be born. Indeed, if the court of appeals' analysis were applied at common law, countless millions might be able to sue manufacturers of chemicals affecting ozone, based on fear that increased exposure to ultraviolet rays will cause skin cancer. Millions of others exposed to asbestos, or PCBs, or any alleged toxin could lodge similar claims. *See Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 812 (Cal. 1993) ("virtually everyone in society is conscious of the fact that the air they breathe, water, food and drugs they ingest, land on which they live, or products to which they are exposed are potential health hazards"). As the New York Court of Appeals has held, "the problem for the law is to limit the legal consequences of wrongs to a controllable degree." *Tobin v. Gossman*, 249 N.E.2d 419, 424 (N.Y. 1969). A test for emotional distress claims that potentially triggers an avalanche of new lawsuits rejects this guidance of the common law.

C. Courts Have Imposed Concrete Tests to Establish the Genuineness of Emotional Distress Claims.

The third policy concern of common law courts, identified by this Court in *Gottshall*, is the danger of imagined, falsified, or exaggerated claims. 114 S. Ct. at 2405. This concern about genuineness focuses not just on the yes or no question whether the plaintiff suffered *any* mental distress. The finders of fact also must assess the

severity and duration of the alleged distress. Each of these factors is intangible, and each is subjective. Compared to physical injuries, each is harder for doctors, and juries, to identify and measure.

Moreover, the source of concern is not exclusively fakers and frauds. In the words of the Supreme Judicial Court of Massachusetts:

> A plaintiff may be genuinely, though wrongly, convinced that a defendant's negligence has caused her to suffer emotional distress. . . . It is in recognition of the tricks that the human mind can play upon itself, as much as of the deception that people are capable of perpetrating upon one another, that we continue to rely upon traditional indicia of harm to provide objective evidence that a plaintiff actually has suffered emotional distress.

Payton v. Abbott Labs, 437 N.E.2d 171, 175 (Mass. 1982). For example, some persons have a psychological need to blame external factors for their feelings of anxiety or depression.[4] A person's subjective belief that he or she has been psychologically harmed thus does not establish the existence of compensable emotional distress, much less its severity, duration, or relation to the alleged negligence. In

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[4] Barton A. Singer, *Psychological and Forensic Considerations in the Treatment of Post-Traumatic Stress Disorders*, 1 Am. J. Forensic Psych. 3, 5-6 (1983); *see* Douglas B. Marlowe, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781, 818 (1988).

other words, absent a threshold standard that objectively corroborates any claimed mental disturbance, the hypochondriac prevails. He is injured to the extent he thinks he is.

The inquiry on each of these issues is further complicated because the process of litigation itself may exacerbate an emotional disturbance or impede recovery. *See Stoleson v. United States*, 708 F.2d 1217, 1222 (7th Cir. 1983) ("awarding damages for hypochondria too freely might aggravate those symptoms and thus make litigation itself a source of illness"); Gary B. Melton, *et al.*, *Psychological Evaluations for the Courts* 283 (1987); Singer, 1 Am. J. Forensic Psych. at 5.[5] In cases involving fear of disease, the kind of litigation at issue here, counsel representing the plaintiff often needs to portray the feared event in the most dire terms and, at the very least, to emphasize the likelihood of its occurrence. Such rhetoric can engender or amplify the very fears at issue in the suit.

A threshold test for emotional distress claims that does not police their genuineness thus neglects a principal goal of the common law in this area. The zone of danger test as applied at common law does serve that function. The standard fashioned by the court of appeals does not.

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[5] Additionally, psychiatry recognizes that the prospect of litigation provides incentives to feign, imagine, or exaggerate a mental disturbance. The DSM-IV, the basic text of psychiatric diagnosis, specifically notes that one of the circumstances creating a strong suspicion of such malingering is the "medicolegal context of presentation," that is, the pendency of a lawsuit. American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* § V65.2 (4th ed. 1994).

D. The Zone of Danger Test as Developed at Common Law and as Applied in *Gottshall* Addresses These Policy Concerns.

To resolve the policy concerns discussed above, common law courts have adopted various tests that set minimum thresholds and outer limits on emotional distress claims. In *Gottshall*, this Court adopted one of the most widely accepted of these standards -- the zone of danger test -- for FELA cases. 114 S. Ct. at 2410. Tracing the evolution of the major common law standards in the context of the policies they serve illuminates how the court of appeals misapplied the zone of danger test here.

Initially, recovery for intangible harm was limited to physical pain and suffering. *See, e.g., Peoria Bridge Assoc. v. Loomis*, 20 Ill. 236 (1858); *Johnson v. Wells, Fargo & Co.*, 6 Nev. 558 (1887). By definition, physical injury is a prerequisite for such a claim.

Eventually, courts began to recognize fright as a compensable harm distinct from physical pain and suffering. But the courts "limited recovery for fright to instances in which the plaintiff would be entitled to recovery for pain and suffering, that is, when the plaintiff had suffered an impact." R. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm -- A Comment on the Nature of Arbitrary Rules*, 34 U. Fla. L. Rev. 477, 487 (1982); *see also, e.g., Spade v. Lynn & Boston R.R. Co.*, 47 N.E. 88, 89 (Mass. 1897) (no recovery for "physical injuries as may be caused solely by such mental disturbances, where there is no injury to the person from without").

Limiting recovery for mental distress to these circumstances, however, created a "tension." Pearson, 34 U. Fla. L. Rev. at 487-88. Mental distress can arise absent physical injury to induce it. To ameliorate this tension, some courts soon began to dilute the impact requirement so that the slightest touching, as opposed to outright injury, sufficed to allow recovery for emotional distress.[6] Still, this distension of the impact rule did not resolve the tension. One subjected to severe fright by a high-speed near collision could not recover, while one merely nudged by a bumper at a mile per hour could.

Moreover, this diluted physical impact rule no longer resolved the policy concerns identified above. *See* Germeroth, 40 St. Louis U.L.J. at 220-21 ("courts also found that the impact test inadequately addressed many of the policy concerns justifying its existence and in many ways served to exacerbate them"). Although requiring some impact allowed fact finders to pinpoint the alleged precipitating event, arguably affording some minimal assurances of genuineness, *Prosser* § 54, at 364 ("The true value of the impact requirement may lie in the opportunity which is afforded to the defendant to testify that there was in fact no impact. . . ."), it provided no assurance that the

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[6] *See Prosser* § 54, at 363-64; Thomas P. Germeroth, *Trapped in the Zone: Emotional Distress Claims Under the FELA After Gottshall*, 40 St. Louis U.L.J. 203, 220 ("in an attempt to reward meritorious claims, courts found themselves satisfying the rule with the slightest of impacts and touches which bore no rational relationship to the existence and severity of emotional injuries"). *See also, e.g., Jones v. Brooklyn Heights R.R. Co.*, 48 N.Y.S. 914 (1897) (plaintiff on railroad car allowed recovery for miscarriage brought on by shock where "impact" was a small incandescent light bulb which fell from roof of car); *Zelinsky v. Chimics*, 175 A.2d 351 (Pa. 1961) (jostling of occupants in automobile).

alleged emotional distress was real, rather than falsified, imagined, or exaggerated. *See Battalla v. State*, 176 N.E.2d 729, 731 (N.Y. 1961) ("fraudulent accidents and injuries are just as easily feigned in the slight-impact cases"); *Chivchiolo v. New England Wholesale Tailors*, 150 A. 540, 543 (N.H. 1930) ("it would seem practically as easy to pretend them [distress damages] and as difficult to disprove them in such [slight impact] cases as in cases where there is no impact"). It did not, standing alone, winnow out trivial claims. *See Prosser* § 54, at 361 ("harmless but emotionally disturbing contact" does not ensure that alleged injury merits recompense). Finally -- particularly with some courts treating mere exposure to allegedly toxic substances as a physical impact -- it placed no meaningful outer boundaries on who could recover. *See, e.g., Eagle-Picher Indus., Inc. v. Cox*, 481 So. 2d 517, 539 (Fla. Dist. Ct. App. 1985) ("Millions of people have been exposed to asbestos. Permitting an action for fear of cancer where there has been no physical injury from the asbestos would likely devastate the court system as well as the defendant manufacturers.").

Because of its many infirmities, reliance on the physical impact test dwindled. *Gottshall*, 114 S. Ct. at 2406 n.7 (listing 5 states); Germeroth, 40 St. Louis U.L.J. at 221, n.120 (listing 6 states). Those states that have applied the physical impact test have generally imposed additional conditions to provide a more reliable threshold test of genuineness than is achieved by the trivialized impact test. In particular, they have insisted that there be some physical manifestation of the emotional distress the plaintiff allegedly

suffered,[7] or that the damages from distress be limited to those directly flowing from the impact.[8]

The more accepted standard for emotional distress claims -- and, most importantly, the one adopted in *Gottshall* for FELA -- is the "zone of danger" test. It resolves the tension inherent in the impact standard, recognizing that "a near miss may be as frightening as a direct hit." *Gottshall*, 114 S. Ct. at 2406 (quoting Pearson, 34 U. Fla. L. Rev. at 488). Thus, the zone of danger test, unlike the physical impact rule, is internally consistent. Fright, fear of imminent physical injury, is the harm recognized as compensable. *Waube v. Warrington*, 358 N.W. 497, 501 (Wis. 1935); *Purcell v. St. Paul City Ry. Co.*, 50 N.W. 1034 (Minn. 1892). Those placed in imminent danger to their physical safety, who are severely frightened by some immediate menace and suffer lasting emotional effects, can recover. Those who suffer some trivial physical impact posing no immediate threat cannot.

This formulation furthers the common law policies discussed above. First, because the zone of danger test

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[7] *See, e.g., Anderson v. Scheffler*, 752 P.2d 667, 669 (Kan. 1988) ("no recovery unless the emotional distress results in an actual physical injury"). While almost all states have abrogated the physical impact test, a majority of jurisdictions have retained the physical manifestation requirement, in many instances as a further limitation on recovery under the zone of danger test, *see, e.g., Carlson*, 520 N.W.2d at 536. *See also, infra*, pp. 19-20.

[8] *Deutsch v. Shein*, 597 S.W.2d 141, 146 (Ky. 1980) ("it is necessary that the damages for mental distress sought to be recovered be related to, and the direct and natural result of, the physical contact or injury sustained"); *Shuamber v. Henderson*, 579 N.E.2d 452, 454 (Ind. 1991) (the physical injury must cause the emotional distress).

focuses on justifiable fear precipitated by a tangible threat to physical integrity -- a speeding car, a wayward bullet, a falling girder -- it is more likely to sift out petty claims of bruised feelings or emotional upset.[9] Second, the test provides some assurance of genuineness, an objectively verifiable factual scenario that -- unlike a mere touching -- could be expected to produce serious emotional distress.[10] And, third, it is clear and bounded, brightly marking the outer borders of liability while allowing recovery for those plaintiffs most likely to be affected. By defining the class of potential plaintiffs as those who were themselves at risk of imminent physical harm, the rule avoids the impossible task of distinguishing among the infinite number of non-threatening events that might cause emotional distress, and among the multitude of potential plaintiffs who could suffer mental distress divorced from any tangible injury or imminent threat. Further, by identifying the primary compensable harm as fear for personal safety, the rule

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[9] *See Rickey v. Chicago Transit Auth.*, 457 N.E.2d 1, 4-5 (Ill. 1983) (zone of danger rule should not encourage "frivolous litigation"). Moreover, by recognizing that a near miss may be as frightening as an actual impact, this standard also alleviates the harshness that led some courts applying the pure physical impact rule to trivialize that requirement. *See, e.g., M.B.M. Co. v. Counce*, 596 S.W.2d 681, 686-88 (Ark. 1980) (allowing recovery when impact was "constructive"); *Zelinsky*, 175 A.2d at 354 ("any degree of physical impact, however slight," is sufficient).

[10] *See Bovsun v. Sanperi*, 461 N.E.2d 843, 848 (N.Y. 1984) (adopting zone of danger rule because it uses "an objective test of whether the plaintiff was unreasonably threatened with bodily harm by the conduct of the defendant"); *Stadler v. Cross*, 295 N.W.2d 552, 554 (Minn. 1980) (reaffirming zone of danger rule because "courts and juries can objectively determine whether plaintiffs were within the zone of danger . . . [and] plaintiffs can be cross-examined regarding whether their fear was for themselves or for another").

advances the goals of FELA.[11] As the Supreme Court stated in *Gottshall*, "the policy considerations of the common law as they are embodied in the zone of danger test best accord with the concerns that have motivated our FELA jurisprudence." 114 S. Ct. at 2411.

II. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF DANGER TEST SEVERS IT FROM ITS COMMON LAW ROOTS AND POLICY GOALS.

In *Gottshall*, this Court described the zone of danger test as limiting recovery to plaintiffs "who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed at immediate risk of physical harm by that conduct." 114 S. Ct. at 2406. The Court also referred to the rule as covering negligent conduct that "threatens [employees] imminently with physical impact." *Id.* at 2411. The court of appeals -- ignoring the context and in particular this Court's focus on imminent physical perils, *id.* at 2410 -- construed the reference to "physical impact" as encompassing a mere touching or bodily contact, rather than immediate injury.[12] *Buckley v. Metro-North Com. R.R.*, 79 F.3d 1337, 1343 (2d

[11] This Court found a third standard, the relative bystander test, inappropriate in the context of FELA. *Gottshall*, 114 S. Ct. at 2411. For one, extending recovery to those who witness the injury of a close family member, as the relative bystander rule does, has little applicability to the railroad workplace. Moreover, the emphasis in FELA "on protecting employees from physical harms [affords] no basis to extend recovery to bystanders outside the zone of danger." *Id.*

[12] The Court in *Gottshall* rejected claims based on "general working conditions" that allegedly yielded emotional distress. 114 S. Ct. at 2409-10. Yet, those general working conditions inevitably involved various and repeated physical impacts.

Cir.), *cert. granted*, 117 S. Ct. 379 (1996). In essence, the court of appeals incorporated into the zone of danger standard the entirely separate diluted physical impact test, without reference to the likelihood of imminent personal harm.

The court of appeals cited no common law case taking this crossbred approach. Nor, indeed, did the court cite a single case interpreting the zone of danger test in any way. It is thus not surprising that the court of appeals' formulation ignores the way the standard evolved, the policies it serves, and the meaning it was afforded in *Gottshall*.

The zone of danger test, as noted, is grounded in the notion of compensating trauma and fright. The zone of danger cases that this Court cited in *Gottshall* -- indeed, zone of danger cases generally -- involve such actual or imminent physical harm causing emotional trauma.[13] A physical impact, a mere touching or even a jostling, would not necessarily cause one to be startled, scared, or traumatized.

[13] *See, e.g., Keck v. Jackson*, 593 P.2d 668 (Ariz. 1979) (car accident where plaintiff sustained serious physical injury); *Towns v. Anderson*, 579 P.2d 1163 (Colo. 1978) (plaintiff having just exited house saw house lifted from its foundation by gas explosion); *Robb v. Pennsylvania R.R. Co.*, 210 A.2d 709 (Del. 1965) (plaintiff's car stuck in railroad crossing grade as train approached though she abandoned car); *Rickey*, 457 N.E.2d 1 (boy standing next to his brother who was injured); *Stadler*, 295 N.W.2d 552 (no recovery for witnessing accident while standing away from harm); *Boucher v. Dixie Med. Ctr.*, 850 P.2d 1179 (Utah 1992) (no recovery for parent where son was negligently treated at hospital); *Garrett v. New Berlin*, 362 N.W.2d 137 (Wis. 1985) (sister saw brother hit by police car pursuing group of persons of which she was part).

The suggestion that exposure to a toxin is an impact, that it places one in the zone of danger because of gradual or long-term adverse effects that may or, more likely, may not occur, is inconsistent with the very design of this standard as a threshold barrier. It removes the inquiry from common experience, uncouples it from concrete events that universally invoke fear, and divorces it from an imminent physical threat posed with reasonable certainty. Instead, it thrusts the inquiry into a realm where reactions are far more individualized, unforeseeable, and uncertain.

Importing the diluted physical impact test into the zone of danger standard, moreover, revives the policy dilemmas the zone of danger test resolved. As noted, mere bodily contact, without more, does not provide assurances that the mental distress claimed is real. *See supra* pp. 10-11. Promoting mere exposure, rather than physical harm or imminent threat of harm, as a threshold for liability poses no obstacle for trivial or evanescent claims. *Cf. Restatement (Second) of Torts*, § 436A cmt. b (1965) ("~~emotional~~ disturbance which is not so severe and serious as to have physical consequences is normally in the realm of the trivial, and so falls within the maxim that the law does not concern itself with trifles"). And allowing virtually everyone exposed to a toxic substance to sue for mental distress, absent any evidence of physical injury, potentially imposes liability coterminous with the exposure. If common law courts applied this standard, the pool of potential litigants could include millions of people. *Ball v. Joy Mfg. Co.*, 755 F. Supp. 1344, 1372 (S.D. W. Va. 1990) (observing that "millions of people have suffered exposure to hazardous substances" and civil actions based on exposure alone "could potentially devastate the court system"), *aff'd*, 958 F.2d 36 (4th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992); *Potter v.*

Firestone Tire and Rubber, 863 P.2d at 812 ("enormity of the class of potential plaintiffs cannot be overstated").

Contrary to the court of appeals' suggestion, it is no response that only physical impact sufficient to cause a reasonable person mental distress is compensable. "Reasonableness" is too vague a standard to filter out frivolous or falsified claims, too tied to specific facts and too shorn of objective content to serve as a threshold test of liability. The court of appeals admitted that the determination whether a reasonable person would develop fear based on exposure to an alleged toxin requires the jury to consider "the nature of the toxic substance, its method of transmission to the body, the extent of the exposure to the substance and how the disease develops in response to the presence of the toxic substance in the body." *Buckley*, 79 F.3d at 1344. Thus, if "reasonableness" were the central limiting feature of the applicable standard, if an inquiry like the one the court of appeals envisioned were required in every case, injured parties, tortfeasors, insurers, and their counsel very often would have no way short of litigation to determine whether there was a compensable claim for emotional distress. *See Thing v. LaChusa*, 771 P.2d 814, 821 (Cal. 1989) (criticizing prior California decisions because litigants "had no means short of suit" to determine whether a claim was actionable).

Not only would such a vague standard fail to resolve the problems that have moved courts to limit liability for emotional distress, but it also would unnecessarily extend litigation. A nebulous measure such as "reasonableness" -- particularly with the complex, fact-intensive gloss the court of appeals gave it -- invites disputes of material fact. It thus

reduces the possibility of eliminating meritless claims on summary judgment.[14]

The court of appeals' intimation that the exposure here was somehow different because it was "massive," *Buckley,* 79 F.3d at 1343, provides no more reliable guidance to courts, juries, or litigants. How "massive" an exposure is sufficient to engender a reasonable fear, if it is not sufficient to cause injury? Is "massiveness" a function of the duration of exposure, the quantity of the alleged toxin, or both? Would a single exposure suffice? Would an exposure of one week qualify? One month? Does the standard vary depending on the capacities of the individual exposed? Could an exposure be characterized as "massive" on the ground that it reached many people, or is "massiveness" measured person by person? Does the standard depend on the potency of the alleged toxin or the disease it allegedly causes? The potential questions, and disputes, are legion. What the court of appeals apparently intended as a limitation in fact would complicate and prolong litigation, without meaningfully cabining liability or excluding trivial claims. The court's standard simply squanders the clarity of the zone of danger test.

Applying the zone of danger standard, as the common law has clearly defined it, to people exposed to latent diseases would not leave them without remedy. If they develop the disease, they have a right to sue for that, and compensating for such physical harm is, after all, the focus

[14] *See Knake v. King*, 492 N.W.2d 416, 417 (Iowa 1992); *Gordon v. Alaska Pac. Bancorporation*, 753 P.2d 721, 725 (Alaska 1988). *See generally* Richard A. Posner, *Economic Analysis of Law* 543-44 (1992) (discussing costs of vague standards, including inefficiency because of need to apply the standard in every case, and lack of deterrence).

of FELA. *See Gottshall*, 114 S. Ct. at 2410. But the zone of danger test will deny recovery to plaintiffs for fear of diseases they are not likely to get based on mere exposure to chemicals that did them no harm.[15] That is not an arbitrary outcome. It is an example of a threshold test properly doing its job. *See id.* at 2411.

III. THE COURT OF APPEALS EVISCERATED THE FACTUAL INQUIRY THAT SHOULD OCCUR AFTER THE ZONE OF DANGER TEST IS MET.

The zone of danger test, even properly applied, is not the end of a trial court's inquiry. It is the beginning. Properly conceived, the test provides reassurance regarding the genuineness of emotional distress claims, but not an ironclad guarantee. It increases the likelihood that the claimed distress is severe, but provides no certainty. It delimits who may *not* recover, but does not establish the plaintiff's entitlement to damages. It is, as advertised, a threshold test.

Once the plaintiff clears this threshold, he or she still has to prove the case. The finder of fact -- be it judge or jury -- still must determine whether the claim of emotional distress is serious, authentic, and tied to the negligence of the defendant. Although the inquiry, like any factual review, must be flexible, this Court should provide guideposts.

[15] This case does not present, and this Court need not address, situations where the plaintiff is more likely than not to contract a disease resulting from a toxic exposure. *Cf. Potter v. Firestone Tire and Rubber*, 863 P.2d at 816. In any event, it seems unlikely that an exposure could create such a probability of illness without causing or threatening any immediate injury.

Specifically, even one in the zone of danger created by the defendant's conduct ought not to recover for trifling or fleeting distress, but rather only for serious or severe distress. The court of appeals rejected this proposition, holding that plaintiffs did not have to prove that their distress was severe if they were able to show physical impact. The court suggested that the sole purpose of requiring proof of severe emotional distress is "to guarantee the genuineness of the claim." *Buckley,* 79 F.3d at 1346. Because, in the court's view, the physical impact requirement apparently fulfills this function, proof of severity is unnecessary. This holding is wrong in at least three respects.

First, the severity requirement, in fact, is not intended simply to assure genuineness. As the Court recognized in *Gottshall*, a central policy of the common law, addressed directly by this requirement, is avoiding a "flood of trivial suits." 114 S. Ct. at 2411. The court of appeals simply ignored that policy.

Second, as noted, the court of appeals' application of the "physical impact" text does not, in fact, provide sufficient assurances of the genuineness of the claim. Between 1940 and 1979, as many as 27.5 million people in the U.S. were exposed to asbestos at their workplace. George M. Lordi and Lee B. Reichman, *Pulmonary Complications of Asbestos Exposure*, Am. Fam. Physician 1471 (Dec. 1, 1973). Do all suffer genuine and compensable emotional distress?

Third, the common law in fact has not cast aside the severity requirement when the plaintiff can prove physical impact. Overwhelmingly, in many contexts, the cases have insisted on proof that the plaintiff's emotional distress is

severe.[16] The court of appeals' abandonment of this precondition is extreme. Moreover, it magnifies the infirmities of the diluted physical impact standard the court applies, and throws the courts open to litigation without limits.

Not only have common law courts held fast to the severity requirement, but -- recognizing the vagueness of this factor -- most have gauged the seriousness of emotional distress by whether the plaintiff has exhibited physical symptoms attributable to the mental disturbance.[17] As the Supreme Court of New Hampshire phrased this standard, the plaintiff must allege and prove that he or she suffered

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[16] *See supra* pp. 11-12; *see, e.g., Payton*, 437 N.E.2d at 180 (court requires plaintiffs to show physical harm to limit suits where "only bad manners or mere hurt feelings are involved"); *Stadler*, 295 N.W.2d 552 (to recover, plaintiff must suffer severe mental distress with resultant physical injury); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980) (severe emotional distress); *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970) (severe emotional distress); *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo. 1983) (emotional distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant); *Schultz v. Barberton Glass Co.*, 447 N.E.2d 109 (Ohio 1983) (serious emotional distress).

[17] "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences . . . the great majority of courts still hold that in the ordinary case there can be no recovery." *Prosser* § 54, at 361. *See, e.g., Muchow v. Lindblad*, 435 N.W.2d 918, 921-22 (N.D. 1989) (insomnia and weight loss were "transitory and inconsequential" and therefore not the requisite "bodily harm"); *Corso v. Merrill*, 406 A.2d 300, 304 (N.H. 1979) (physical symptoms guarantee "that the emotional injury is sufficiently serious to be afforded legal protection"); *Restatement (Second) of Torts* § 436A cmt. b.

physical harm as a result of the conduct causing the emotional distress. *Thorpe v. State Dept. of Corrections*, 575 A.2d 351, 353-54 (N.H. 1990). Further, the harm "must be susceptible to some form of objective medical determination and proved through qualified medical witnesses." *Id.* at 353 (quoting *Corso v. Merrill*, 406 A.2d 300, 304 (N.H. 1979)).

Physical manifestation of injuries is thus useful in distinguishing serious from insubstantial emotional distress. It also provides additional assurance that the claim is genuine.[18] That the physical manifestation requirement is overinclusive -- that it might let through its screen some claims of emotional distress which in fact are not genuine or serious -- suggests only that it is best used as urged here, as one factor in a factual analysis undertaken *after* the threshold zone of danger standard has been met. The contention that the physical manifestation criterion is underinclusive -- that it may exclude legitimate claims of emotional distress which happen not to be accompanied by any physical symptoms -- has been asserted, but not proved. As the *Restatement (Second) of Torts* notes, physical consequences are a hallmark of serious harm to psychological health. *Restatement* § 436A cmt. b. This evidentiary guidepost is thus closely linked to the policies of the common law and of FELA.

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[18] Claims of mental anguish unaccompanied by physical injuries "are more often assumed than real -- and the suit too liable to be wholly speculative." *Ruth v. Fletcher*, 377 S.E.2d 412, 415 (Va. 1989). The Supreme Court of Rhode Island, despite recognizing advancements in the field of psychiatry, reaffirmed its requirement of physical symptomatology on this basis: "because of the nature of the illness it is too difficult to substantiate absent objective physical symptomatology." *Reilly v. United States*, 547 A.2d 894, 897 (R.I. 1988).

The court of appeals' conclusion that proof of physical impact should obviate this inquiry, as well as the general requirement of severity, makes no sense. It, too, amplifies the flaws of the court's jerry-rigged zone of danger test. The court compounded the problem even further by effectively dispensing with any objective corroboration of the plaintiff's claimed mental distress. The court asserted that the mere act of complaining about the exposure, without more, provided all the substantiation needed to meet the threshold test. *See Buckley*, 79 F.3d at 1346. The argument is a *non sequitur*. As a matter of logic, that a plaintiff complained about exposure to asbestos does not show, or even tend to show, that his claimed fear of disease is real. The disgruntled worker, the hypochondriac, the charlatan, are as likely to complain as a person in genuine distress. *See supra* pp. 7-8.

CONCLUSION

The court of appeals fashioned a new hybrid test that conflicts with common law standards, ignores the critical lessons of the common law, and clashes with the basic goals of FELA. PLAC urges that the Court reverse the court of appeals' decision and reaffirm the zone of danger standard as this Court adopted it just two years ago.

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